

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HUMBOLDT BAYKEEPER and  
ECOLOGICAL RIGHTS FOUNDATION,

No. C 06-02560 JSW

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY,  
et al.,

**ORDER REGARDING MOTION  
FOR RECONSIDERATION AND  
OTHER OUTSTANDING ISSUES  
FROM PRETRIAL CONFERENCE**

Defendants.

Now before the Court is Plaintiffs' motion for reconsideration of this Court's order denying their Motion *in limine* No. 1 with respect to undisclosed witnesses. Rule 26 requires parties to disclose the identity of their expert witnesses "accompanied by a written report prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). Parties are required to serve their opening and expert rebuttal reports "at the times and in the sequence directed by the court." Fed. R. Civ. Proc. 26 (a)(2)(c). "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed."<sup>1</sup> *Yetti by Molly Ltd v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This rule excludes untimely expert witness testimony, unless the "parties' failure to disclose the required information is substantially justified or harmless." *Id.*; *see also Carson*

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<sup>1</sup> Rule 37 provides in pertinent part: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. Proc. 37(c)(1).

1 *Harbor Village, Ltd. v. Unocal Corp.*, 2003 WL 22038700, \*2 (C.D. Cal. 2003) (“Excluding  
2 expert evidence as a sanction for failure to disclose expert witnesses in a timely fashion is  
3 automatic and mandatory unless the party can show the violation is either justified or  
4 harmless.”) (internal quotes and citation omitted). Defendants bear the burden of demonstrating  
5 their failure was either substantially justified or harmless. *Yetti by Molly*, 259 F.3d at 1107.

6 Defendants try to avoid the disclosure and reporting requirements of Rule 26(a) by  
7 arguing that these witnesses are “non-retained” experts and, thus, may provide testimony based  
8 on personal knowledge of a factual situation. However, pursuant to Federal Rule of Evidence  
9 701, lay witnesses may testify based upon their experience, but they may not provide opinions  
10 “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”  
11 Fed. R. Evid. 701; *see also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir.  
12 1997) (holding that opinion by lay witness on observations that were not “common” but  
13 required demonstrable expertise was improper). The purpose of this limitation is “to eliminate  
14 the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple  
15 expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701 Advisory  
16 Committee Notes (2000 Amendment). Thus, “[t]he mere percipience of a witness to the facts  
17 on which he wishes to tender an opinion does not trump Rule 702.” *Figueroa-Lopez*, 125 F.3d  
18 at 1246. Even the authority Defendants rely on concludes that “[i]f the proposed testimony of a  
19 non-retained expert witness identified pursuant to Rule 26(a)(2)(A) will exceed the scope of the  
20 individual’s percipient knowledge and ventures into more general expert testimony, a report  
21 will be required.” *Vaxiion Therapeutics, Inc. v. Foley & Lardner, LLP*, 2008 U.S. Dist. LEXIS  
22 51171, at \*6 (S.D. Cal. July 2, 2008).

23 Upon review of the record, the Court finds that Defendants seek to have each of these  
24 three witnesses testify on matters based on their expertise and not merely their percipient  
25 observations. Moreover, Defendants have not demonstrated that their failure to timely disclose  
26 these witnesses as experts was either harmless or justified. Therefore, the GRANTS Plaintiffs’  
27 partial motion for reconsideration and HEREBY EXCLUDES Frans Lowman, Dr. Terry  
28 Huffman, and John Winzler from testifying at trial.

1 The Court also addresses the following issues outstanding from the pretrial conference  
2 held on February 16, 2010:

3 (1) Plaintiffs' Motion *in limine* No. 1 with respect to excluding certain documents is  
4 GRANTED as to Exhibits 2097, 2172, 2193, 2196, 2249, 2254-56, 2308-74. Plaintiffs' Motion  
5 *in limine* No. 1 is DENIED with respect to Exhibits 2173-2183 to the extent that Defendants  
6 seeks to use these exhibits to support an argument other than the State owns a portion of the  
7 Balloon Track.

8 (2) With respect to Plaintiff's Motion *in limine* No. 4, to the extent that Defendants seek  
9 to argue that the pipes are not physically located on the Balloon Track, they may make that  
10 argument based on documents that have been properly produced. However, Defendants are  
11 precluded from arguing that the pipes may be physically on the property but are owned by the  
12 State.

13 (3) Defendant North Coast Railroad Authority ("NCRA") asserted, for the first time, in  
14 its pretrial conference statement, that Plaintiffs' claim against it under the Clean Water Act is  
15 preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49  
16 U.S.C. § 10501(b). First, the Court notes that the strength of NCRA's conviction that this  
17 matter is preempted is belied by NCRA's significant delay in raising this issue. Second, and  
18 more importantly, the Court finds that NCRA fails to demonstrate that the Clean Water Act  
19 claim is actually preempted by the ICCTA. The ICCTA provides that the Surface  
20 Transportation Board ("STB") will have exclusive jurisdiction over "the construction,  
21 acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or  
22 side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one  
23 State." *See* 49 U.S.C. § 10501(b)(2). The ICCTA further provides that "the remedies provided  
24 under this part with respect to regulation of rail transportation are exclusive and preempt the  
25 remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

26 Despite the broad language of the ICCTA, both courts and the STB have limited the  
27 preemptive scope of this Act. As the Eleventh Circuit held, the express preemption of the  
28 ICCTA, "applies only to state laws 'with respect to *regulation* of rail transportation.'" *Florida*

1 *East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)  
 2 (quoting 49 U.S.C. § 10501(b)) (emphasis in original). ICCTA preemption only displaces  
 3 “‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘managing]’  
 4 or ‘governing]’ rail transportation” and permits “the continued application of laws having a  
 5 more remote or incidental effect on rail transportation.” *Id.* (finding that the enforcement of  
 6 existing zoning ordinances of general applicability were not preempted); *see also Association of*  
 7 *American Railroads v. South Coast Air Quality Management District*, 2007 U.S. Dist. LEXIS  
 8 65685, \* 14 (C.D. Cal. April 30, 2007) (finding the Clean Air Act was not preempted, noting  
 9 that the “STB has repeatedly held that ‘nothing in section 10501(b) is intended to interfere with  
 10 the role of state and local agencies in implementing Federal environmental statutes, such as the  
 11 Clean Air Act, the [Clean Water Act], and the [Safe Drinking Water Act].’”) (quoting *Boston*  
 12 *and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at  
 13 \*5 (STB, Apr. 30, 2001)).<sup>2</sup>

14 The STB has made clear that “[n]othing in section 10501(b) is intended to interfere with  
 15 the role of state and local agencies in implementing Federal environmental statutes, such as the  
 16 Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is  
 17 being applied in such a manner as to unduly restrict the railroad from conducting its operations  
 18 or unreasonably burden interstate commerce.” *See Friends of the Aquifer*, STB Finance Docket  
 19 No. 33966, 2001 WL 928949, \*4 (STB, Aug. 10, 2001); *see also Boston and Maine Corp. and*  
 20 *Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at \*5 (STB, Apr. 30,  
 21 2001). NCRA’s only argument that Plaintiffs’ attempted enforcement of the Clean Water Act  
 22 unreasonably burdens interstate commerce is that the cost of litigating this action is high.  
 23 NCRA fails to provide any authority demonstrating that the mere cost of litigating a claim may  
 24 be found to unreasonably burden interstate commerce. Moreover, if NCRA truly believed that

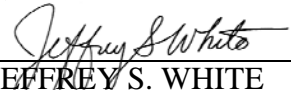
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26 <sup>2</sup> NCRA’s reliance on *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998)  
 27 is misplaced. In *Auburn*, the court merely held that the ICCTA preempted local regulations  
 28 regarding the function and operation of rail lines. The court noted that if the local authority  
 had the ability to impose permitting regulations on the reopening of a rail line, such power  
 would amount to “economic regulation” if the carrier were prevented from conducting such  
 activity. *Id.* The Clean Water Act was not at issue in *Auburn*.

1 Plaintiffs' claim against it was preempted, it could have moved to dismiss this claim when it  
2 was first filed and, thus, sought to limit the cost of the litigation. The Court finds that the  
3 application of the Clean Water Act to NCRA in this action is not preempted by the ICCTA.

4 **IT IS SO ORDERED.**

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6 Dated: May 27, 2010

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE